BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Examine the Commission's Energy Efficiency Risk/Reward Incentive Mechanism.	Rulemaking 09-01-019 (Filed January 29, 2009)

THE OFFICE OF RATEPAYER ADVOCATES' PETITION FOR MODIFICATION OF DECISION 10-12-049

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CPUC Decisions

CPUC Rules of Practice and Procedure

California Evidence Code

California Public Utilities Code

Federal Evidence Code

Other Authorities

I. INTRODUCTION

Pursuant to Rule 16.4 of the *Commission's Rules of Practice and Procedure*, the Office of Ratepayer Advocates (ORA) submits the following Petition for Modification of Decision (D.) 10-12-049, the "Decision Regarding the Risk/Reward Incentive Mechanism True-Up for 2006-2008" (Decision). The Decision awarded Pacific Gas and Electric Company (PG&E) $29.1 million in shareholder incentives for the performance of PG&E's energy efficiency programs.

ORA's Petition for Modification of D.10-12-049 (PFM)[1] is based on a newly discovered fact: a May 31, 2010 email from former PG&E vice president Brian Cherry to former PG&E senior vice president Thomas Bottorff[2] describing Mr. Cherry's May 30, 2010 conversation over dinner with Commission President Michael Peevey.[3] The email reveals a tainted process in which the Commission's President both entertained PG&E financial requests for favorable outcomes on pending matters and requested PG&E contributions to causes he supported. According to Mr. Cherry's May 31, 2010 email, President Peevey agreed that in exchange for

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[1] A PFM appears to be a reasonable choice under the Commission's *Rules of Practice and Procedure* to rectify due process violations in light of the newly discovered email. Rule 16.4 does not explicitly state that it is a vehicle for requesting rescission of a decision, but Public Utilities Code Section 1708, one of the authorities cited for Rule 16.4 provides that the Commission may "rescind, alter, or amend" any order or decision after providing parties notice and opportunity to be heard. Moreover, D.13-12-053 states: "After a record is closed, the only filings permitted pursuant to the Commission's Rules of Practice and Procedure are a Petition for Modification or a Motion to Reopen the Record." D.13-12-053, issued in R.11-02-019, *Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure,* Finding of Fact 16 at page 24, *rehearing denied* D.14-05-034, *petition for review granted on other grounds*, Court of Appeal of the State of California, First Appellate District, Division Two, A.142127, November 3, 2014. Since ORA is not requesting that the Commission reopen the record, a PFM appears to be the best option under the Commission's *Rules of Practice and Procedure*.

[2] At the time of the May 31, 2010 email, Mr. Cherry and Mr. Bottorff were PG&E vice presidents, but PG&E fired both in the wake of the email scandal, beginning with a series of emails released on September 15, 2014 in PG&E's Notice of Improper *Ex Parte* Contacts filed in A.13-12-012.

[3] Rule 16.4(c) provides that petitions for modification must be filed within one year of the effective date of a decision, but Rule 16.4(d) allows petitions for modification to be filed more than one year after the effective date of a decision if the petition explains why the petition could not be filed sooner. Rule 16.4(b) requires that allegations of new or changed facts be supported by appropriate declaration or affidavit. ORA's declaration appended as Attachment A attests to the fact that ORA did not learn of Mr. Cherry's email depicting due process violations until on or about October 6, 2014. Appended to this PFM as Attachment B is the October 6, 2014 letter from PG&E attorney Martin S. Shenker to Commission Executive Director Paul Clanon, including the May 31, 2010 email from Brian Cherry to Tom Bottorff, appended as Exhibit A to Attachment B (other portions of PG&E's Exhibit A are not attached). Appended to this PFM as Attachment C are ORA's proposed modifications to D.10-12-049.

PG&E's contribution to a campaign to support Assembly Bill (AB) 32, he could "live with" payment of energy efficiency incentives to PG&E in the amount of $26 million.

The Commission approved the Decision authorizing the $29.1 million incentive award to PG&E by a 3-2 vote, so the Decision required the vote of President Peevey, whose bias is evidenced in Mr. Cherry's May 31, 2010 email. The Commission should therefore modify D.10-12-049 to rescind the Decision. Given the bias and due process violations revealed by Mr. Cherry's May 31, 2010 email, the entire Decision is tainted and should be vacated, including the incentives awarded to Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas).[4] The Commission should decide anew whether incentive awards to the Utilities are warranted based on the existing record and in a manner consistent with due process. Due process requires that President Peevey recuse himself from voting on the Decision.

Alternatively, the Commission could grant the pending "Application for Rehearing of Decision 10-12-049," filed January 26, 2011 by the Division of Ratepayer Advocates[5] and The Utility Reform Network (TURN). That application for rehearing requests that the Commission reverse D.10-12-049's award of $68 million to the Utilities because of legal flaws separate[6] and independent of Mr. Cherry's May 31, 2010 email depicting a tainted process that violated the due process rights of parties to the proceeding.

[4] ORA's PFM refers collectively to PG&E, SCE, SDG&E and SoCalGas as "the Utilities."

[5] The Division of Ratepayer Advocates was renamed the Office of Ratepayer Advocates effective September 26, 2013, pursuant to Senate Bill No. 96 (Budget Act of 2013: public resources), which was approved by the Governor on September 26, 2013.

[6] The DRA/TURN Application for Rehearing of Decision 10-12-049 requested that the Commission grant the Application for Rehearing and revise the Decision to eliminate the award of additional incentives for the Utilities 2006-2008 energy efficiency programs. The Decision's basis for awarding additional incentives was that it was "unreasonable" to expect the Utilities to modify their energy efficiency programs in response to changing market conditions, yet the conclusion that the Utilities had insufficient information or notice to revise their energy efficiency programs is contradicted by the record. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=38252.

II. BACKGROUND

A. Decision 07-09-043 adopted an incentive mechanism designed to promote energy efficiency as a resource, but implementation of the incentive mechanism was contentious and time consuming.

The Commission recognized the importance of energy efficiency as a resource for meeting California's energy needs by adopting a risk/reward incentive (RRIM) mechanism in D.07-09-043 intended to align the interests of shareholders and ratepayers in pursuing energy efficiency. The premise of the RRIM was straightforward: the Utilities would design and implement energy efficiency programs to reduce the demand and consumption of energy, and shareholders and ratepayers would share the savings that exceeded the Commission's goals. The Utilities would design energy efficiency programs using forecasted (*ex ante*)[7] data for the number of measures installed, and the expected savings and demand reductions, but the award of incentives would rely on the Energy Division's independent verification (*ex post)* of actual installations and savings. Reliance on *ex post* measurements would ensure that ratepayers paid incentives for real savings rather than forecasted savings that did not materialize.[8]

Decision 07-09-043 found that an effective incentive mechanism should include the possibility of receiving incentives during the three-year energy efficiency program cycle. To provide timely feedback to the Utilities for their performance in achieving energy efficiency savings, and to "produce a stream of earnings during and at the end of the program to provide

[7] The tension between the use of *ex ante* and *ex post* measurements was at the heart of nearly all RRIM disputes. *Ex ante* means parameters (including number of energy efficiency measures installed, amount of savings achieved per measure, and the amount of demand reduction achieved per measure) as predicted at the outset of the program. *Ex post* applies to those same parameters as measured and verified after the completion of the program. Thus, *ex ante* and *ex post* numbers will likely differ, just as any real world forecast is likely to differ from the actual event. Using *ex post* numbers in the RRIM as originally designed was an important ratepayer protection that would decrease the temptation for the Utilities to use inflated savings estimates in order to obtain higher incentives. D.07-09-043, Findings of Fact 109 and 111, p. 204. The use of *ex post* numbers for energy efficiency savings is also more reliable for procurement planning purposes.

[8] D.07-09-043, Conclusion of Law 5(e), p. 216 ("All calculations of the net benefits and kW [kilowatt], kWh [kilowatt hour] and therm achievements are independently verified by the Commission's Energy Division and its evaluation, measurement and verification (EM&V) contractors, based on adopted EM&V protocols.")

ongoing incentives to the [U]tilities," the RRIM included two interim incentive payouts as well as one final true-up claim tied to the final verification of energy savings actually achieved.[9]

Decision 07-09-043 provided that the interim incentive payments would be calculated using *ex ante* forecasts of demand reduction and energy impacts parameters, but verified (or *ex post*) measurements of the costs and number of energy efficiency measures installed.[10] The two interim payments would be adjusted or "trued-up" after Energy Division's *ex post* evaluation determined *actual* demand reduction and energy savings consistent with established evaluation, measurement and verification (EM&V) protocols.[11]

The intent of the RRIM was to align shareholder and ratepayer interests[12] and therefore promote effective implementation of energy efficiency programs, but its implementation was fraught with controversy at every step of the process. Three times after the RRIM's adoption in 2007 the Commission revised the RRIM to make it easier for the Utilities to receive incentives, while at the same time increasing the risk that ratepayers would pay for savings that did not exist or that were not the result of the Utilities' energy efficiency programs. The Utilities successfully petitioned to modify D.07-09-043 to limit the requirement to pay back incentives awarded based on *ex ante* forecasts of savings that turned out to be overstated;[13] the Utilities successfully petitioned to modify D.07-09-043 so that the first interim incentive payments were based on self-reported data even though the Energy Division's independent verification showed that three

[9] D.07-09-043, p. 124.

[10] D.07-09-043, pp. 114-15; 116 (Energy Division staff verify utility reported information regarding number of installations and their costs as part of the interim verification process, but "per-measure savings are still based on expected or estimated (*ex ante)* savings for each of the interim claims.")

[11] D.07-09-043, p. 116 ("For the final 'true-up' claim, the achievements considered at that time reflect the results of the Final Verification and Performance Basis Report, that is, the *ex post* results of all performance parameters evaluated by Energy Division and its consultants for the program cycle;" p. 119 "it is not until the final true-up claim that we will be able to determine the level of net benefits (PEB) and MW, GWh and MTherm savings produced by the energy efficiency portfolio over the three-year period, based on all the EM&V activities undertaken for that program cycle;" Ordering Paragraph 4, p. 221.

[12] D.07-09-043, pp. 2, 4.

[13] D.08-01-042, p. 9. ("we are persuaded by the arguments presented by the [U]tilities (and supported by NRDC) that the value of any energy efficiency earnings as a systematic part of the utility's basic business earnings will be seriously degraded, unless we modify the true-up provisions adopted by D.07-09-043.")

of the four Utilities, including PG&E, were not entitled to incentives;[14] and the Utilities, while dissatisfied with the use of any verified numbers, argued successfully for the adoption of an APD awarding additional interim incentives,[15] which calculated the sharing rate for the second interim incentive payment using the Utilities' proposed unmodified *ex ante* assumptions in comparing the Utilities' results with the Commission goals.[16] By 2010, the Utilities had received $143.1 million in interim incentive payments for their administration of the 2006-2008 energy efficiency programs.

B. The Assigned Commissioner and Administrative Law Judge established a process for the final true-up of 2006-2008 incentives during 2010.

The final step to finalize RRIM incentives for the 2006-2008 energy efficiency programs incentives was the "true-up" of the two interim payments to reflect verified installation and energy savings data. Assigned Commissioner John Bohn issued an April 8, 2010 ruling that included the opportunity to comment on the Energy Division's "Evaluation Reporting Tools/Database" (ERT) and the RRIM calculator for determining the true-up of incentive earnings.[17] Assigned Commissioner Bohn issued a subsequent ruling on May 4, 2010 providing the Energy Division's Scenario Analysis Report and soliciting comments on nine scenario runs

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[14] The Commission revised the RRIM in 2008 to award interim incentives of $82 million (D.08-12-059, Ordering Paragraph 5, p. 28) based on the Utilities' self-reported savings, even though the Energy Division's independent verification showed that PG&E, SCE, and SDG&E were not entitled to incentives. Energy Efficiency 2006-2007 Verification Report, February 5, 2009, p. 8. http://www.cpuc.ca.gov/PUC/energy/Energy+Efficiency/EM+and+V/081117_Verification+Report.htm. The report was available in draft form at the time the Commission awarded incentives to the Utilities. DRA and TURN filed an application for rehearing of D.08-12-059 on February 2, 2009, which is still pending.

[15] Administrative Law Judge Pulsifer's PD used updated *ex ante* parameters as set forth in the Energy Division's Second Verification Report to calculate the second interim incentives claims and awarded no additional incentive payments. The APD used the Energy Division Second Verification Report to calculate savings achieved, but used the Utilities' proposed unmodified *ex ante* assumptions in comparing the Utilities' results with the Commission goals to achieve a 12% sharing rate. D.09-12-045 gave the Utilities $61 million in incentives. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=26486

[16] TURN's January 28, 2010 Application for Rehearing of D.09-12-045 is still pending.

[17] Assigned Commissioner's Ruling on Process for True-Up of Incentive Earnings, April 8, 2010. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=30030

that calculated incentives using different assumptions.[18] Administrative Law Judge Pulsifer issued a ruling on July 21, 2010 directing the filing of the Energy Division's Final *2006-2008 Energy Efficiency Evaluation Report*, a comprehensive summary of the evaluation of energy efficiency savings achieved, completed at a cost of $97 million and "representing one of the largest energy efficiency impact evaluations in the world … implemented by leading evaluation professionals."[19] That report showed that when measured against the goals established for RRIM, not a single utility met the threshold for additional incentives.[20]

Between April 20 and August 2, 2010, parties to the proceeding filed comments on the scenarios and underlying numbers to be used to true-up the 2006-2008 incentives awards. The Utilities argued that it was unfair to measure their energy efficiency savings based on the actual savings achieved.[21] ORA contended that ratepayers should only pay energy efficiency incentives for verified savings:

> "[ORA] cannot support any scenario that has not been independently verified by the Energy Division and its consultants, or that fails to include up-to-date values for measuring energy savings. Using a scenario that awards incentives for unverified savings, or that fails to incorporate the most up-to-date energy savings values would undercut the bargain struck by Decision (D.) 07-09-043. Utilities, which enjoy full cost recovery for cost-effective programs, would be allowed to reap rewards based not on their proficiency in delivering energy savings, but for their persistent efforts to change the incentive mechanism and for their ongoing

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[18] Assigned Commissioner's Ruling Providing Energy Division Report and Soliciting Comments on Scenario Runs, R. 09-01-019, May 4, 2010, p. 3. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=30812

[19] D.10-12-049, p. 29.

[20] D.07-09-043 provided that shareholders would begin earning incentives when energy efficiency program savings reached the "minimum performance standard" (MPS), or 80-85% of the goals established in D.04-09-060. D. 07-09-043, p. 26; Ordering Paragraph 2, p. 219.

However, Table 24 "Comparative of Program Cycle 2006-2008 Evaluated Results to Goals" at page 100 of the *2006-2008 Energy Efficiency Evaluation Report* showed that the Utilities performance compared to goals ranged from 37% to 71%.

[21] Comments of Pacific Gas and Electric Company (U 39 M), Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902 M) and Southern California Gas Company (U 904 G) to Assigned Commissioner's Ruling on Process for True-Up of Incentive Earnings, April 20, 2010, p. 3 ("the [Energy Division EM&V] results also came too late to allow for meaningful adaptation of utility programs during the program cycle. Therefore, the Joint Utilities recommend that each ERT scenario should apply the following *ex ante* values…).

criticisms of the independently administered studies that measure energy savings."[22]

C. Brian Cherry's May 31, 2010 email recounts a May 30, 2010 dinner with President Peevey that included a discussion about energy efficiency incentives entirely unrelated to the evidence in the record or the ongoing true-up process.

Notwithstanding the process established by the ACRs and ALJ rulings to determine the final incentives that the Utilities would receive for their 2006-2008 energy efficiency programs, Brian Cherry's May 31, 2010 email to Thomas Bottorff portrays an advantageous relationship between President Peevey and PG&E separate and apart from the established process.[23]

The May 31, 2010 email from one PG&E senior executive to another reveals a relationship between PG&E and Commission President Michael Peevey in which PG&E felt free to press for the results it wanted on pending matters in private, outside the record (PG&E "needed changes to the LTPP [long term procurement planning proceeding] itself if we wanted to keep Oakley alive. Mike was fine with that and said he would look into it;"[24] "Mike is aware that we are looking for a good GRC [general rate case] decision…I suggested we could live with $625 million and Mike chuckled a bit.")[25]

The email reveals a relationship in which PG&E received President Peevey's advice and opinions on PG&E's actions and their public relations impact ("Mike reiterated his belief that our 'low road' tactics were not only ineffective but beneath us and have caused more harm than good;"[26] "Mike wants to talk about the direction we are headed as a Company - what we support moving forward relative to renewable policy, CCA, the City and County of SFO and our communication strategy for getting back in the public's good graces.")[27]

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[22] The Division of Ratepayer Advocates' Comments on the 2006-2008 Energy Division Scenario Report and Scenario Runs, May 18, 2010, p. 2.

[23] The May 31, 2010 email is appended as Exhibit A at Attachment B to this PFM.

[24] Attachment B, Exhibit A.

[25] Attachment B, Exhibit A.

[26] Attachment B, Exhibit A.

[27] Attachment B, Exhibit A.

The email reveals a relationship in which PG&E was privy to information about how other Commissioners would vote ("Mike confirmed that he dropped a Commission resolution opposing Prop 16 because he couldn't get Simon on [b]oard.")[28]

The email reveals a relationship in which PG&E received requests for donations from President Peevey ("Mike stated very clearly that he expects PG&E to step up big and early in opposition to the AB32 ballot initiative;" "He expects PG&E…to contribute $100,000 … to the celebration committee…")[29]

Notwithstanding the true-up process established by Assigned Commissioner Bohn and Administrative Law Judge Pulsifer, the email reveals the existence of a separate back channel for PG&E to press for incentives outside the record of the energy efficiency incentives proceeding. Mr. Cherry:

> "suggested to Mike that the numbers were still subject to debate, but we could reach some agreement. I jokingly suggested that if he gave us $26 million, we could come up with $3 million or so for AB 32. He said that is a deal he could live with - but we both agreed lots of things above my pay grade have to happen before that is a reality."[30]

D. Unlike Administrative Law Judge Pulsifer's Proposed Decision (PD), President Peevey's Alternate Proposed Decision (APD) ignored the results of the final true-up of 2006-2008 energy efficiency programs and awarded PG&E $29 million in additional incentives.

On September 28, 2010 Administrative Law Judge Pulsifer issued a PD, which determined that the Utilities deserved no additional incentive based on the final true-up of their 2006-2008 energy efficiency programs.[31] The PD's final true-up of incentive earnings relied on the Performance Earnings Basis data in the Energy Division's Scenario Analysis Report, and applied a 0% shared savings rate based on assumed performance metrics that fall within the deadband range under the adopted incentive formula.[32]

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[28] Attachment B, Exhibit A.

[29] Attachment B, Exhibit A.

[30] Attachment B, Exhibit A.

[31] Proposed Decision Regarding the Risk/Reward Incentive Mechanism Earnings True-Up for 2006-2008, September 28, 2010 (Pulsifer PD), Findings of Fact 16-19, p. 71. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=34663

[32] Pulsifer PD, pp. 8, 23 and Appendix A.

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Assigned Commissioner Bohn issued an APD on the same day as the PD. The APD approved a shared savings rate of 12%, consistent with the shared savings rate used to calculate interim incentive payments awarded in D.09-12-045, and approved additional incentive payments totaling $77.3 million for the final true-up.[33]

President Peevey issued an APD on November 6, 2010, which proposed awarding the Utilities final incentive payments of $29.1 million to PG&E, $18.6 million to SCE; $5.1 million to SDG&E; $9.9 million to SoCalGas.[34] The Commission approved a version of the Peevey APD on December 16, 2010,[35] with President Peevey, Commissioner Bohn and Commissioner Simon voting to adopt the Peevey APD, and Commissioners Ryan and Grueneich dissenting.

ORA and TURN filed an Application for Rehearing on January 26, 2011, which remains pending.

III. DISCUSSION

A. The evidence and outcome demonstrate President Peevey's bias.

Brian Cherry's email portrays a private dinner between a PG&E Vice President and the President of the Commission.[36] The email describes PG&E's close access to the Commission's President in a private setting that included off the record and unreported communications on pending matters. PG&E admits that some of those communications in the email violated the Commission's *ex parte* rules contained in Article 8 of the Commission's Rules of Practice and Procedure.[37] While the oral communications regarding the energy efficiency incentives

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http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=34663

[33] Bohn Alternate Proposed Decision Regarding the Risk/Reward Incentive Mechanism Earnings True-Up for 2006-2008, September 28, 2010, p.2, Finding of Fact 16, p.56. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=34665

[34] Peevey Alternate Proposed Decision Regarding the Risk/Reward Incentive Mechanism Earnings True-Up for 2006-2008, November 16, 2010 (Peevey APD), Ordering Paragraph 1, p. 29 and Appendix A. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=36316

[35] D.10-12-049 awarded SCE $24.1 million, but the incentive awards to PG&E, SDG&E and SoCalGas were unchanged from the Peevey APD.

[36] See Exhibit A to Attachment B

[37] Attachment B, October 6, 2014 letter from PG&E attorney Martin S. Shenker to Commission Executive Director Paul Clanon, p. 1. ("PG&E has identified additional *ex parte* communications that it failed to disclose as required by Commission Rule 8.4.").

proceeding may not have violated Rule 8.4 of the Commission's rules of Practice and Procedure,[38] they are nevertheless evidence of serious due process violations and significant bias.

"The fundamental requisite of due process of law is the opportunity to be heard;" an impartial decision maker is an "essential" component of a meaningful opportunity to be heard.[39] A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party.[40]

While it appears that the finder of fact for the PD, Administrative Law Judge Pulsifer, was an impartial decision maker, there is evidence that at least one[41] of the three decision makers who sponsored and voted in support of the Peevey APD was not. The statements and behavior attributed to President Peevey are not those of an impartial decision maker. The email instead revealed a decision maker that held utility customers and their advocates in very low regard: "TURN and DRA would ruin the industry if left to their own devices."[42]

President Peevey's May 30, 2010 admonition to Brian Cherry "not to expect too much given the large amounts [PG&E] got over the last two years" exposes a mindset that had no need to review the results of the ongoing true-up process (i.e., to consider what the record showed about how well PG&E's energy efficiency programs had performed) before deciding on the amount of the award. Indeed, it implies that in light of the large "gifts" bestowed earlier, a smaller gift was in order this time. This suggestion of largesse raises the distinct possibility that energy efficiency incentives were unrelated to actual energy savings.

The morning after his dinner with President Peevey, Mr. Cherry reported to his supervisor Thomas Bottorff that he:

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[38] Assigned Commissioner's Ruling Amending Scoping Memo Ending *Ex Parte* Reporting Requirements, filed December 10, 2009 in R.09-01-019, p. 2. ("The *ex parte* reporting requirements set forth in Rule 8.2 (c) and Rule 8.3 shall cease to apply to this proceeding effective immediately. Parties are no longer required to report *ex parte* communications in this proceeding.")

[39] *Goldberg v. Kelly*, 397 U.S. 254, 267, 271 (1970) (citation omitted).

[40] *Haas v. County of San Bernardino* 27 Cal.4th 1017, 1025 (2002) ("When due process requires a hearing, the adjudicator must be impartial.")

[41] While it appears that President Peevey suggested that PG&E CEO Peter Darby should have lunch with Commissioner Bohn "to speed things up," there is no evidence whether the lunch occurred, or if it did, what was said.

[42] Attachment B, Exhibit A.

> "suggested to Mike that the numbers were still subject to debate, but we could reach some agreement. I jokingly suggested that if he gave us $26 million, we could come up with $3 million or so for AB 32. He said that is a deal he could live with - but we both agreed lots of things above my pay grade have to happen before that is a reality."[43]

At a minimum, the reported exchange reveals a decision maker who listened to a PG&E representative requesting a favorable outcome based on information that had no bearing on the facts of the case or the adopted true-up process, but related instead to PG&E's willingness to make financial contributions to a cause that President Peevey favored. At worst, the reported exchange suggests a possible *quid pro quo* arrangement in which the decision maker favored a party willing to make requested contributions. Parties to the proceeding deserve better: they deserve decision makers who make decisions based on the record of the proceeding in light of California's energy efficiency goals. The public deserves no less.

B. Mr. Cherry's May 31, 2010 email is evidence of a serious due process violation and is admissible in this proceeding.

Pacific Gas and Electric Company may argue that the statements made in Mr. Cherry's email should not be considered or admitted into this proceeding because it is hearsay insofar as it repeats Mr. Cherry's own statements at the May 30, 2010 dinner, and that his summary of President Peevey's remarks at the dinner are double hearsay. The Commission should reject any such arguments.

As an initial matter, Rule 13.6(a) of the Commission's *Rules of Practice and Procedure* provides that "although the technical rules of evidence need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." Rulemaking 09-01-019 was a ratesetting proceeding in which hearings were not held, but the guidance of Rule 13.6(a) is nevertheless instructive. The Commission therefore should consider the email evidence supporting this PFM in a manner that preserves the substantial rights of parties.

Hearsay is generally defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[44] "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the

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[43] Attachment B, Exhibit A.

[44] *California Evidence,* Fifth Edition, 2012, B. E. Witkin, Vol. 1, Chapter VI, Section 1, p. 783.

person intended it as an assertion.[45] "Declarant" means the person who made the statement.[46] The intent of the hearsay rule is to prevent unfairness to parties who do not have the opportunity to cross examine the declarant regarding the declarant's perception, memory and veracity.[47]

The May 31, 2010 email of Brian Cherry was a communication not made on the record of the proceeding. Parties to R.09-01-009 have had no opportunity to cross examine Mr. Cherry or otherwise respond to the statements in his email regarding energy efficiency incentives. The email is therefore potentially hearsay. Reliance on uncorroborated hearsay materials, the truth of which is disputed and which do not come within an exception to the hearsay rule, does not form the basis for a valid decision.[48]

1. Mr. Cherry's statements regarding his observations and what he said are admissible as an admission by a party to the proceeding.

However, hearsay is admissible when it is made by a party to the proceeding.[49] Mr. Cherry made the statements in his May 31, 2010 email when he was PG&E's vice president of regulatory relations, authorized to discuss company policy with CPUC staff and Commissioners. The email was generated by Mr. Cherry only one day after the meeting had occurred, in which he recounts the facts to his superior, Mr. Bottorff. One should assume a high degree of accuracy in the facts if only because they were reported while still fresh in Mr. Cherry's memory. There is also no reason to assume that, in the private email to Mr Botorff, that Mr. Cherry would not report the meeting candidly and accurately.

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[45] California Evidence Code (Ev. C.), Section 225.

[46] Ev. C. Section 135.

[47] *People v. Ayala,* 23 C4th 225, 268 (citation omitted) (2000) ("The general rule that hearsay evidence is inadmissible because it is inherently reliably is of venerable common law pedigree.").

[48] *The Utility Reform Network v. Public Utilities Commission,* 223 Cal. 4th 945, 949 (2014).

[49] *See* Section 1222 of the California Evidence Code ("Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if...[t]he statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and... [t]he evidence is offered either after admission of evidence sufficient to sustain finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence;" Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay if offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

Consideration of the email in a proceeding in which PG&E was a party does not infringe on PG&E's rights as a party to the proceeding. In fact, a series of January 2014 emails between Mr. Cherry and two Commissioners and one Commissioner's advisor[50] was the basis of the recusal of two Commissioners from PG&E's current gas transmission and storage rate case Application (A.) 13-12-012, as well as proceedings related to the San Bruno pipeline explosion and for the reassignment of a Commission staff member.[51] Statements in the email recounting what Mr. Cherry said at the dinner are therefore admissible as admissions by a party to the proceeding, regardless of whether they would otherwise be hearsay.

The May 31, 2010 email of Brian Cherry recounts not just what Mr. Cherry said, but statements made by President Peevey on May 30, 2010, so those statements must also be examined for the possibility that they are hearsay. An essential element of hearsay is that the statement must be offered to prove the truth of the matter asserted in the statement.[52] Some of the statements attributed to President Peevey are by definition not hearsay because they are not being offered to prove the truth of their contents, but rather, the fact that the inappropriate conversation occurred.

- "Mike complained that Bohn has been ineffective in moving this matter quickly" is not offered to prove that Commissioner John Bohn was ineffective, but to show that President Peevey felt free to share criticisms of the Assigned Commissioner's oversight of the energy efficiency incentives proceeding with PG&E's vice president of regulatory relations;
- President Peevey "suggested that Peter[53] have lunch or dinner with John and tell him to speed things up" is not hearsay, because "a verbal proposal to perform an act" is neither inherently true nor false.[54]

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[50] Pacific Gas and Electric Company's Notice of Improper *Ex Parte* Communications, filed September 15, 2014 in A.13-12-012, Attachment A.

[51] http://www.sfgate.com/bayarea/article/Investigators-search-CPUC-in-judge-shopping-5876888.php

[52] Ev. C. Section 1200.

[53] From the context of the email, it is reasonable to assume that Peter (a name that occurs seven times in the email) was PG&E's then CEO Peter Darby, who subsequently resigned after the San Bruno tragedy and John was John Bohn, the Assigned Commissioner to the energy efficiency incentives rulemaking.

[54] Verbal conduct consisting of a proposal to perform an act is nonhearsay because it is neither inherently true nor false. *People v. Cowan*, 50 C4th 401, 472-73 (2010).

- "Mike supports us getting incentives but told me not to expect too much given the large amounts we got the last two years" is not hearsay because President Peevey's statement to Mr. Cherry "not to expect too much given the large amounts [PG&E] got over the last two years" does not assert a fact but counsels Mr. Cherry regarding his expectations.
- "He said that is a deal he could live with - but we both agreed lots of things above my pay grade have to happen before that is a reality" is not offered to assert whether or not President Peevey could "live with the deal" or the steps that would need to happen before "the deal" would come to fruition, but as evidence that the Mr. Cherry and the Commission President discussed the possibility linkage of contributions to favored causes with a desired outcome in the energy efficiency incentives proceeding.[55]

2. Any statements attributed to President Peevey that would otherwise be hearsay are admissible as implied admissions.

ORA is unaware of any direct response by President Peevey disavowing the statements attributed to him in Mr. Cherry's May 30, 2010 email. According to a CPUC statement published in a local newspaper article, the email represents "an interpretation of events from the perspective of a PG&E employee, and President Peevey disagrees with the characterizations."[56] Regardless of whether President Peevey would "characterize" the events in the email differently, the CPUC statement contains nothing remotely approaching a denial that President Peevey made statements along the line recounted in Mr. Cherry's May 31, 2010 email.

The Commission President's failure to personally and unequivocally deny the statements attributed to him in Brian Cherry's email, and the tepid response in the CPUC statement, weigh in favor of treating any hearsay statements attributed to President Peevey as implied admissions. The theory of implied admissions allows consideration of evidence that would otherwise be considered hearsay in situations where it is reasonable to assume a person would deny the statements attributed to the person if they were untrue.[57]

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[55] *See United States v. Oguns*, 921 F.2d 442, 448-49 (2nd Cir. 1990) ("'Have the apples arrived there?" was not submitted for the truth of what was said but simply as evidence that such a statement was made; it was therefore not inadmissible hearsay but non-hearsay circumstantial evidence of knowledge and intent.)

[56] http://www.sfgate.com/bayarea/article/CPUC-head-Michael-Peevey-to-step-down-5812009.php

[57] *California Evidence,* Fifth Edition. B. E. Witkin, Vol. 1, Chapter VI, Section 106, p. 932. Ev. C

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Given the absence of an unequivocal denial that President Peevey uttered words along the lines of the statements attributed to him in Brian Cherry's email, it is reasonable to consider those statements as evidence of due process violations in the energy efficiency incentives proceeding. This is especially true given the larger context of PG&E's back channel communications with Commission offices recounted in a series of emails from January 2014 and disclosed on September 15, 2014. Those emails show Mr. Cherry still at work nearly five years after the May 31, 2010 email, pulling the strings behind the scenes of the Commission in order to secure the assignment of a judge perceived as most likely to produce PG&E's desired outcome in its gas transmission and storage proceeding.

All parties to the energy efficiency proceeding, including the other Utilities and environmental and ratepayer advocacy groups had a right to a decision based on the record from an unbiased decision maker. Consideration of evidence of due process violations supports the interest of parties and the public in a fair proceeding based on the evidence in the record.

C. President Peevey's sponsorship of an APD that ignored the basis of ALJ Pulsifer's PD and President Peevey's participation in a 3-2 vote produced a tainted decision that must be annulled.

President Peevey's APD proposed awarding the Utilities final incentive payments notwithstanding the fact that the RRIM, even as modified up to that point, would not justify any additional incentives. The Peevey APD acknowledged that if adopted, the Commission would once again be revising the established RRIM in favor of the Utilities:

> "In calculating the final round of incentive payments, we have made significant modifications to the mechanism that was originally adopted in D.07-09-043. Specifically, rather than assessing the performance of the utilities' energy efficiency programs based on updated parameters, as was our original intent, we now modify the mechanism such that the performance against the goals as well as the total savings attributed to the utility programs for purposes of determining incentives are calculated using the parameters that were in place at the time the Commission approved the utility energy efficiency portfolios."[58]

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Section 1220; *Simpson v. Bergmann*, 125 Cal. App. 1, 8 (1932) ("The ground of admissibility, however, is not that the letter affords any proof that the statements therein are true, but that silence, when such statements are calculated to draw forth a reply, may be the ground for an inference that the statements are true.")

[58] Peevey APD, p. 3. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=36316

The Peevey APD disregarded the reasoning of ALJ Pulsifer's PD that:

> "only real and independently verifiable program-related net benefits qualify for incentives, as stated in D.07-09-043:
>
> 'Ratepayers will only be required to share net benefits with shareholders to the extent that those net benefits actually materialize, based on Energy Division's EM&V results. Consequently, the true-up of incentive earnings must be based upon net benefits that have been evaluated independently by the Energy Division.'"[59]

In direct contradiction of the rationale of ALJ Pulsifer's PD, which affirmed the Commission's previously adopted methodology to calculate the award based on verified savings, the Peevey APD revised the RRIM to rely on *ex ante* forecasts made when the Utilities planned their programs in 2005, rather than the field-tested measurements reflected in the Energy Division's 2006-2008 Energy Efficiency Evaluation Report. The Commission approved the Peevey APD on December 16, 2010, with President Peevey, and Commissioners Bohn and Simon voting to adopt the Peevey APD, and Commissioners Ryan and Grueneich dissenting.

Commissioner Grueneich's dissent to D.10-12-049 pointed out that the Decision's award of additional incentives to the Utilities rested on the factually incorrect premise that the Utilities had insufficient notice or opportunity to respond to changing market conditions.[60] Commissioner Ryan's dissent echoed similar concerns:

> "Prior decisions clearly stated our expectation that the utilities would be judged based on *ex post* updates. The decision establishing the Risk Reward Incentive Mechanism program underscored the uncertainty about *ex ante* parameters, so the utilities were put on notice that these parameters were stale and likely to charge.
>
> We expected the [U]tilities to continually adjust portfolio plans in response to all available information, not just the final and approved Energy Division evaluation

[59] Pulsifer PD, p. 4 (citation omitted). http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=34663

[60] Members of the Peer Review Group criticized the Utilities for using net to gross (NTG) values for some energy efficiency measures that were outdated, inaccurate, and likely too high. This dispute was summarized in a July 21, 2005 Case Management Statement filed in A.05-06-004 before the 2006-2008 energy efficiency programs even started. Administrative Law Judge Pulsifer's PD cited evidence of notice to the Utilities, but it was absent from the Decision. Commissioner Grueneich's dissent points out the evidence of notice to the Utilities that is omitted in the Decision. Commissioner Grueneich's dissent is appended as Attachment B to the DRA/TURN Application for Rehearing of Decision 10-12-049. http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=38252

> reports. We expected the [U]tilities to rely on the observations of alert and motivated program managers and insights gained from ongoing market research. I am convinced the [U]tilities had sufficient information to act upon and modify their programs."[61]

Due process requires the Commission to annul the Decision. The United States Supreme Court, in considering a case involving a bad-faith insurance claim in which the state supreme court justice who wrote the opinion and cast the deciding vote had similar litigation pending against his own insurer, found:

> "we are aware of no case, and none has been called to our attention permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings."[62]

The Commission did exactly that on its own motion to rectify due process violations in one of its own proceedings:

> "Based on the initial examination into developments leading up to the Commission's vote on September 17, 1993, we conclude that fairness to all parties … would be best served by rescission of Decision (D.) 93-09-076… issued on September 24, 1993. We have determined that the proprietary team concept, designed to facilitate technical implementation of our decision, was compromised … because it was transformed beyond its intended purpose. …[W]e have determined that certain members of the team assisted in review and editing of the draft decision, tasks which moved beyond the authorized task of providing calculations and computations. In addition, one or more members of the team improperly engaged in unreported communications with a decision maker…."

The Commission therefore rescinded Decision (D.) 93-09-076 in its entirety.

IV. CONCLUSION

The Commission should take this opportunity to rectify the serious due process violations exposed in Brian Cherry's May 31, 31 2010 email revealing a biased decision maker who, if he

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[61] D.10-12-049, Dissent of Commissioner Nancy E. Ryan, p. 2; *see also* D.07-09-043, Finding of Fact 158, p. 212: "The [U]tilities have been put on notice well before the 2006-2008 program cycle began that PEB [performance earnings basis] parameters associated with load impacts, particularly NTG [net-to-gross] ratios, would be trued-up based on *ex post* studies in each program cycle. Assertions that a true-up of these parameters in the final earnings claim represents unforeseen evaluation risk are therefore without merit.").

[62] *Aetna Life Ins. Co. v. Lavoie* 475 U.S. 813, 827-828 (U.S. 1986) (footnote omitted).

did not make a *quid pro quo* agreement to award PG&E shareholder incentives in exchange for contributions to a favored campaign, at a minimum entertained PG&E's request for a favorable outcome in the energy efficiency incentives proceeding and in the same conversation requested that PG&E contribute to a cause he supported. Brian Cherry expressed his desire for incentives of $26 million. Seven months later, a Decision that disregarded the rationale of the assigned ALJ as well as evidence in the record awarded PG&E incentives in line with Mr. Cherry's request.

The Governor's advisor on improving the Commission's process recognized the damage wrought by the recent email disclosures: "There's been a profound loss of public confidence in the commission. "It's not going to be all that easy to correct that."[63] Rescinding D.10-12-049, as an earlier Commission did when it discovered that utility advisors had engaged in unreported conversations with a decision maker related to D.93-09-076, would be a critical first step in restoring public confidence in the integrity of the Commission's decision making process.

The Commission should therefore modify D.10-12-049 by rescinding the decision and issuing a new decision based solely on the existing record. President Peevey should recuse himself from voting on the new decision. Alternatively, the Commission could grant the currently pending application for rehearing of D.10-12-049, which raises legal insufficiencies apparent even before the email came to light.

Respectfully submitted,

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[63] Statement of Ed O'Neill, a senior adviser to Governor Jerry Brown on modernizing and reforming the Commission, made at the October 21, 2014 Power Association of Northern California meeting, as reported by California Energy Markets October 24, 2014, p. 6.